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No. 87-1684

SUPREME COURT U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,
v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY
EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN
OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON,
DAVE NEWTON WESSON AND JASON MANNING WESSON,
MINORS, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of Mississippi

SUPPLEMENTAL BRIEF

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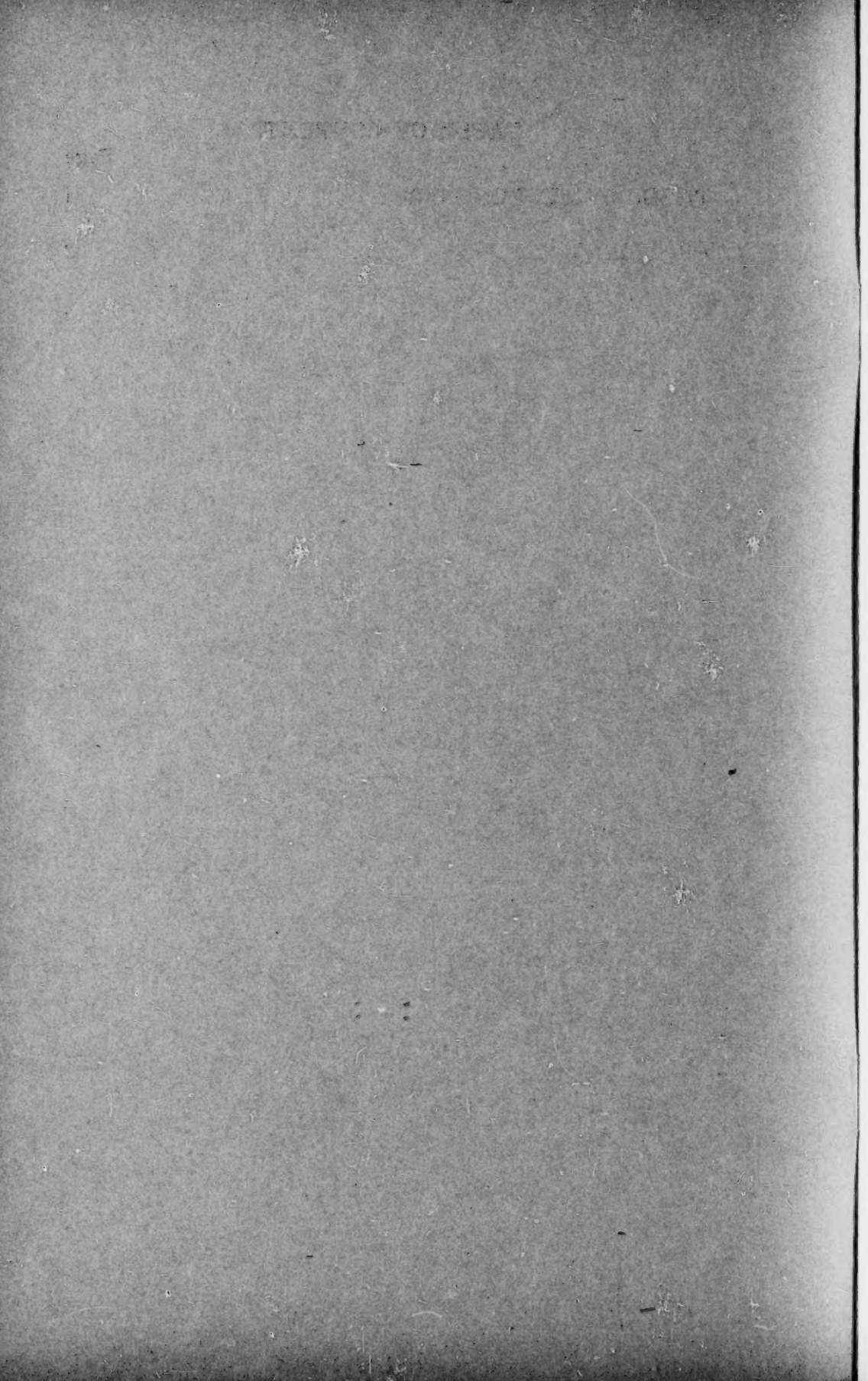


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Respondent submits this supplemental brief pursuant to Rule 22.6 of the Rules of this Court to call attention to a new case and other intervening matter not available at the time of filing of respondent's Brief in Opposition. In particular, respondent will address the applicability of this Court's recent decision in *Banker's Life & Casualty Co. v. Crenshaw*, No 85-1765, decided May 16, 1988, (Point I), and the contentions raised in the brief *amicus curiae* filed on May 10, 1988 by the American Council of Life Insurance, (Point II).

ARGUMENT

I. THIS COURT'S DECISION IN *BANKERS LIFE & CASUALTY CO. v. CRENSHAW* MANDATES THAT CERTIORARI BE DENIED IN THE PRESENT CASE.

This case involves three constitutional challenges—grounded in the Excessive Fines Clause of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Supremacy Clause of Article VI—to an award of punitive damages under Mississippi law for bad faith refusal to pay an insurance claim. Respondent has demonstrated that this Court should not exercise its certiorari jurisdiction under 28 U.S.C. § 1257(3) to review these constitutional issues because they were not “specially set up or claimed” in a proper manner at a proper time in the Mississippi Courts. *See* Brief in Opposition at 5-18.¹

Bankers Life & Casualty Co. v. Crenshaw mandates denial of the petition for certiorari in this case for the reasons set forth in the Brief in Opposition. Recognizing that constitutional challenges to civil punitive damage awards raise “question[s] of some moment and difficulty,” this Court made clear in *Crenshaw* that the requirement of proper presentation of federal questions in the state court, and the jurisprudential policies underlying that requirement, “apply with special force” in cases seeking review of these questions. Slip Op. at 7. *See also*

¹ Petitioner never raised any due process challenge to the punitive damage award at any stage in the state proceedings. Petitioner’s Eighth Amendment and ERISA preemption claims were not raised in the proper and timely manner under Mississippi law—indeed, neither claim was even mentioned until after petitioner had filed its briefs in the Mississippi Supreme Court. Furthermore, petitioner never sought to raise these issues in a petition for rehearing to the Mississippi Supreme Court. As a result, the Mississippi Supreme Court has not ruled on any of the issues petitioner asks this Court to review.

id. at 1, 4 (O'Connor, J., concurring in part and concurring in the judgment). The Court emphasized that in the context of challenges to state-authorized punitive damage awards, there are "strong reasons to adhere scrupulously to the customary limitations" on review under section 1257(3):

"Our review now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that, the Mississippi state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent non-federal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits."

Id. at 7-8. *Accord Illinois v. Gates*, 426 U.S. 213, 224 (1983).²

All of the jurisdictional and prudential considerations that led this Court to decline review of the constitutional issues in *Crenshaw* apply equally in this case. As in *Crenshaw*, the petitioner here sought to raise in this Court several constitutional challenges to an award of punitive damages in a bad faith insurance case under Mississippi law arising in the Mississippi courts. As in *Crenshaw*, the petitioner here failed to raise any of those constitutional challenges in a proper manner at a proper time in the courts of Mississippi.

² On the same day it decided *Crenshaw*, this Court also dismissed the appeal in *Alabama Power Co. v. Capps*, No. 87-1597, which raised similar due process and Eighth Amendment issues.

Neither “comity to the States” nor “the constellation of practical considerations, chief among which is [the] need for a properly developed record,” Slip Op. at 7, would be served by granting the petition in this case. Because petitioner failed to raise its Due Process claim at all in the state court, and raised its Excessive Fines and ERISA preemption claims in an incomplete, untimely, and improper manner, the courts of Mississippi have had no opportunity to either adjudicate the merits of these issues or provide an adequate and independent state ground of decision that would obviate the need for review by this Court. And, as respondent has demonstrated, petitioner’s procedural defaults have precluded development of a factual record sufficient to decide those federal questions. See, e.g., Brief in Opposition at 13-15.

Petitioner is on even weaker ground in urging review than was the appellant in *Crenshaw*. In *Crenshaw*, the appellant had at least attempted, albeit inadequately, to raise some form of constitutional challenge to the punitive damage award in a petition for rehearing. In *Crenshaw*, this Court suggested that review might have been appropriate had the appellant raised its constitutional claims with sufficient specificity in that petition for rehearing. Slip Op. at 5 (citing *Hathorn v. Lavern*, 457 U.S. 255, 262-265 (1982)). In the present case, however, petitioner chose not to utilize that method of raising issues in the Mississippi Supreme Court, and did not seek review of its federal constitutional claims (or of any other claim) in a petition for rehearing. Accordingly, there is even less justification for finding the requisite “proper presentation” here than there was in *Crenshaw*.

II. THE BRIEF *AMICUS CURIAE* OF THE AMERICAN COUNCIL OF LIFE INSURANCE FAILS TO ADDRESS FUNDAMENTAL JURISDICTIONAL DEFECTS IN THE PETITION FOR CERTIORARI, MISCONSTRUES THE SUBSTANTIVE ISSUES PRESENTED IN THIS CASE, AND OFFERS NO SOUND REASON FOR GRANTING A WRIT OF CERTIORARI.

The brief *amicus curiae* of the American Council of Life Insurance in support of the petition for certiorari raises several interesting issues of federal constitutional law. This case, however, does not present most of the issues *amicus* would like this Court to address. In any event, petitioner's procedural defaults preclude this Court's consideration of *all* of the federal constitutional issues discussed in the *amicus* brief. *Amicus* has not even attempted to suggest why this Court should exercise its jurisdiction under 28 U.S.C. § 1257(3) notwithstanding the obvious jurisdictional flaws in the petition. Nor, in light of *Crenshaw*, can *amicus* plausibly do so.

1. *The ERISA preemption claim.* *Amicus* repeatedly seeks to characterize the ERISA preemption issue in this case as a question of the retroactivity *vel non* of this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. —, 95 L. Ed. 2d 39 (1987). At page 8 of its brief, for example, *amicus* contends that "[i]n denying effect to *Pilot Life* with respect to outstanding decisions, [the court below] permits claimants with pending appeals to circumvent ERISA." See also *Amicus* Brief at 2 (suggesting that court below held that "lower courts will apply *Pilot Life* only to facts arising after that decision was rendered"); *id.* at 6-7 (discussing principles of retroactivity). This argument seriously misconstrues the ERISA preemption issue in this case.

The Mississippi Supreme Court did not hold that *Pilot Life* should not be given retroactive application to cases pending on direct appeal. The court's opinion does not

contain one word about retroactivity, and does not even remotely suggest that *Pilot Life* would not be followed in cases on appeal in which the defendant had properly raised and preserved an ERISA preemption defense in the trial court. To the contrary, as the face of the court's opinion makes plain, and as respondent demonstrated in its Brief in Opposition at 12-18, the Mississippi Supreme Court declined to consider the applicability of *Pilot Life* to this case because petitioner waived the affirmative defense of ERISA preemption by failing to raise it at the proper time and in the proper manner in the trial court, in its assignments of error, or in its briefs on appeal. There is no reason to think that, had petitioner properly raised and preserved the defense of ERISA preemption, the Mississippi Supreme Court would have failed to give effect to *Pilot Life*. The retroactivity argument is thus no more than an effort to "circumvent" the consequences of petitioner's failure to follow the procedural requirements of Mississippi law.

Indeed, the argument *amicus* offers in support of retroactive application of *Pilot Life* unintentionally (but dramatically) confirms that petitioner had no reasonable excuse for failing to raise the defense of ERISA preemption in a proper and timely manner. As *amicus* makes plain, *Pilot Life* did no more than "reaffirm[] . . . the preemptive breadth of ERISA." *Amicus* Brief at 7. It did not overrule any prior decision of this Court or invalidate a previously unquestioned practice. *Id.* at 8. To the contrary, *Pilot Life* was clearly "foreshadowed" in prior decisions of this Court and in ERISA itself. *Id.* at 7 (citing cases). Even before *Pilot Life*, as *amicus* notes, "several lower federal courts had concluded that ERISA preempts state common law claims, like those asserted here." *Id.* In light of the impressive evidence *amicus* has marshalled, it cannot plausibly be argued that petitioner should be relieved of the failure to raise an ERISA preemption defense on the ground that *Pilot Life* was not foreseeable.

2. *The Due Process and Excessive Fines Claims.* *Amicus* also urges review of the punitive damage award in this case based on a host of challenges grounded in the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. Many of these issues have never been raised in this case, even in the petition for certiorari, and thus are wholly inappropriate for review. For example, *amicus* argues that the substantive standard applied in the decision below to determine *liability* for punitive damages is constitutionally deficient because this standard allegedly permitted imposition of punitive damages without a finding of “intentional culpability.” *Amicus* Brief at 14. The petition raises no such challenge to the judgment below, and with good reason. As respondent has demonstrated, the substantive standard applied by the jury in this case—contained in a jury instruction proposed *by petitioner*—required a finding that petitioner’s conduct was “so grossly negligent and reckless as to be the same as an intentional denial.” See Brief in Opposition at 3, 24-25 & n.15.³

In any event, review by this Court is precluded because neither this nor any other Due Process or Excessive Fines claim raised in the *amicus* brief was properly raised or decided in the state court. For example, *amicus* urges that the award of punitive damages violated the Due Process Clause because “the courts below failed to accord” criminal procedural protections to petitioner in the trial court proceedings. But, again, as respondent has

³ Furthermore, this Court has ruled that in *federal* cases arising under 42 U.S.C. § 1983, punitive damages can be awarded without any finding of intentional misconduct. *Smith v. Wade*, 461 U.S. 30 (1983). *Amicus* is thus urging the Court to rule that the Due Process clause requires a higher standard for imposing liability for punitive damages in *state* courts than this Court has found appropriate for imposing liability for punitive damages in federal courts. Not surprisingly, petitioner has not made that claim, and *amicus* has cited no authority in support of that claim.

shown, petitioner never *requested* any such protections in the trial court, and the Courts of Mississippi have never had the opportunity to decide, under state law or under federal law, whether and to what extent additional procedural protections might be required in cases involving possible punitive damage awards. Under these circumstances, review by this Court of the Due Process and Excessive Fines claims would be wholly inappropriate.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in respondent's Brief in Opposition, the petition for certiorari should be denied.

Respectfully submitted,

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